

DOCKET SECTION

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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Postal Rate and Fee Changes, 1997

Docket No. R97-1

POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

**NEWSPAPER ASSOCIATION OF AMERICA
COMMENTS IN RESPONSE TO NOTICE OF INQUIRY NO. 1**

October 3, 1997

The Newspaper Association of America hereby respectfully submits its
comments in response to Commission Notice of Inquiry No. 1 in this proceeding.¹

1. *Has the Service filed other material in this case as a library reference that does not appear to qualify for that designation under a reasonable interpretation of applicable Commission rules?*

Yes.

2. *If the answer to No. 1 is affirmative,*
 - a. *what numerical designation and title has the Service assigned the material; and*
 - b. *to what specific proposal does it relate?*

Although NAA has not conducted an extensive review of the library references filed in this case, NAA is aware of at least two other library references that appear not to qualify for that designation (in addition to Library Reference LR-H-112 that was the subject of the Motion To Strike filed by Nashua *et al*).² These are:

LR-H-109 (Standard Mail (A) Processing ECR Costs):

This document presents a calculation of mail processing costs for Standard (A) Enhanced Carrier Route letter and non-letter mail. The results are presented by witness Daniel (USPS-T-29 at Ex. 29D). In the

¹ *Notice of Inquiry No. 1 On Interpretation Of Commission Rules Authorizing The Use of Library References* (Sept. 17, 1997).

² *See NDMS Motion to Strike Testimony of David R. Fronk* (USPS-T32) (filed Aug. 29, 1997); *Presiding Officer Ruling No. R97-1/20* (Sept. 17, 1997).

document, separate costs are calculated for walk-sequenced and non-walk-sequenced mail and used by witness Moeller in his rate design.³ So far as NAA is aware, separate mail processing costs have never been previously calculated for walk-sequenced and non-walk-sequenced Standard (A) mail.

LR-H-182 (Standard Mail (A) Unit Cost By Weight Increment):

This document contains a purported "cost study" cited by Witness Moeller as support for his proposed reduction of the pound rate in Standard (A) Mail.⁴ See *Newspaper Association of America Motion To Strike Portions of Testimony of United States Postal Service Witness Joseph D. Moeller* (Sept. 26, 1997).

3. *Are any revisions to the Commission's rules needed to address practices that have evolved with respect to library references?*

No. NAA respectfully submits that what is needed is not another layer of procedural rules to be honored in the breach, but simply an adherence to and serious enforcement of the rules as they now exist. Having designated the above materials as library references, the Postal Service may not rely upon new analyses contained in them in support of its direct case, and it is unfair to others to give the Postal Service an opportunity to rectify its "litigation strategy" by belatedly sponsoring a witness.

Un-sponsored library references are not record evidence upon which the Commission may rely

Rule 53 of the Commission's rules of practice states unequivocally that "[s]imultaneously with the filing" of a formal request for a change in rates, the Postal

³ In the library reference, indirect costs are distributed proportionally to direct IOCS tallies. Approximately two-thirds of the costs are indirect; accordingly, the one-third of the costs that are direct control the distribution of the great majority of the costs.

⁴ That this "cost study" is filed as a library reference is particularly ironic given that the Commission has, for a decade, repeatedly asked the Postal Service to provide a better study of the effect of weight on third-class/Standard Mail costs.

Service “shall file *all* of the prepared direct evidence upon which it proposed to rely in the proceeding on the record . . . to establish that the proposed changes . . . are in the public interest” and comply with law. 39 C.F.R. § 3001.53 (emphasis added). This rule could not be more clear: the Postal Service must file *all* of the direct evidence upon which it relies to support *changes* at the very beginning of the case.⁵

Rule 31 and the Commission’s Special Rules of Practice are also quite clear as to when a document filed as a library reference constitutes “evidence.” Rule 31 states: “Designation of a document as a library reference is a procedure for facilitating reference to the document in Commission proceedings and does not, by itself, confer any particular evidentiary status upon the document.” Similarly, the Special Rules of Practice 5 specifies, in language that apparently has not changed for many years, that library reference material “is not evidence unless and until it is designated and sponsored by a witness.” Special Rule 5, Presiding Officer Ruling R97-1/4, Attachment B. Neither LR-H-109 nor LR-H-182 is designated or sponsored by a witness. Therefore, they do not constitute evidence. Accordingly, by the Commission’s very rules they are not evidence upon which the Commission may rely consistent with due process. See *Mail Order Association of America v. United States Postal Service*, 2 F.3d 408 (D.C. Cir. 1993).

Library References 109 and 182 both employ new analyses that are significant changes from methodologies that underlie current rates. LR-H-109 is used to derive cost differentials between walk-sequenced and non-walk-sequenced Standard Mail,

⁵ Rule 31, relating to evidence, provides that documents and “detailed data and information” shall be presented as exhibits. 39 C.F.R. § 3001.31(a).

which are then used in rate design; LR-H-182 is used as support for a substantial reduction of the pound rate in Standard ECR Mail. These library references do not present technical adjustments or clarify ministerial errors; they in fact provide new analyses or methodologies that have never been the subject of record testimony, and that are relied upon by witnesses that advocate material changes in rate design. As these unsponsored library references are not "evidence," they cannot support changes from current rates. While the Postal Service is certainly free to propose changes in rate design, rule 53 requires that it do so on the basis of evidence filed at the outset of the case, not non-record materials.

It is simply not enough for a witness that did not devise, conduct, or write the analysis to refer to it in the witness's own testimony. Only those non-record sources that have the authority deserving of official notice may support a recommended decision from the Commission. Quoting from a non-record source does not convert the source into a record document.

The Postal Service, in opposing NDMS's motion, suggests that it does not necessarily agree with or want to sponsor all of the material contained in the multitudinous number of library references which it routinely files. This is certainly understandable. Both the Postal Service and intervenors occasionally find it appropriate to file some requested materials as library references. Such situations differ greatly, however, from those present here, when the material is the only place in which a new methodology appears.

The Postal Service cannot have it both ways. If it agrees with the new work of its consultants and believes them sufficient to support a change, it is free to file them as sponsored evidence. If it does not agree with its consultants sufficiently to sponsor

them as new evidence, it need not sponsor them. It may not, however, hide behind library references and allow its witnesses to base testimony on unsponsored new analyses that it is unwilling or unable to sponsor through a witness.

The Postal Service's practice of providing institutional responses to interrogatories directed to unsponsored library references does not rectify the fact that the documents themselves are not evidence. And a non-record document does not become a record document merely because an interrogatory response (even if designated) cannot bootstrap a non-record, unsponsored document into record evidence.

In addition to these legal concerns, policy interests also support insisting on a firm adherence by the Postal Service to the rules as to new evidence. Intervenors have far less time and resources than the Postal Service to review, understand, critique, and respond to the Postal Service's direct case. Their task is made far more complex when key support for proposed changes is quietly submitted in unsponsored library references, where intervenors are less likely to notice them. In this case, for instance, both LR-H-109 and LR-H-182 play a more significant role in this case than several of the documents filed as testimony.⁶ The least one should be able to expect is that the Postal Service will submit proposed new cost analyses in the form of evidence.

⁶ Both library references are used in setting rates, either in estimating underlying attributable costs or in rate design. Contrast these with the testimony of witness Bernstein, which apparently plays little if any real role in the Postal Service's presentation.

The Postal Service should not be allowed belatedly to cure its defects by sponsoring a witness for the library references

Neither the Commission's permanent rules of practice nor the Special Rules of Practice allow the Postal Service to cure its failure to file all of its direct evidence at the beginning of the case. To the contrary, the rules require the Postal Service to file its direct case at the very outset, not in bits and pieces throughout the first several months of a case.

NAA is aware, of course, that the Commission is allowing the Postal Service to sponsor a belated witness as to LR-H-112. This practice is regrettable, as it is not consistent with the agency's procedural rules, constitutes no sanction for the Postal Service's rule violation, and makes this Commission's processes less efficient and its task more difficult.

Furthermore, the belated sponsoring of a previously unsponsored library reference injures intervenors by making the Postal Service's direct case a moving target. Put differently, intervenors cannot know whether the Postal Service's case can be assessed as filed, or whether subsequent filings will supplement the record.

This also presents tactical problems for intervenors. As matters stand today, in instances where the only new cost support for a change is in an unsponsored library reference, intervenors face a dilemma. If they remain silent during discovery, and point out that there is no record cost support for a change only on brief, they risk that the Commission may choose to overlook the evidentiary shortcomings,⁷ perhaps out of a belief that parties should have spoken up earlier. If, on the other hand, intervenors

⁷ See generally *Parcel Shippers Association Memorandum of Law On The Issue Of The Evidentiary Value of Unsponsored Library References* (Sept. 17, 1997).

point out the defect earlier in the case, they risk that the Commission will allow the Postal Service to cure the defect through sponsorship by a new witness, thus supplying the record basis that otherwise would not exist. The only solution to this dilemma is to enforce the rules as written.


For these reasons, allowing the Postal Service belatedly to identify a previously non-existent sponsor of a "new cost study"⁸ during hearings on its direct case to fill a hole in its presentation violates the rules of practice, makes the Commission's task more difficult, and places intervenors at a significant disadvantage.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the instant document on all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

October 3, 1997


William B. Baker

⁸ The characterization is witness Moeller's. See USPS-T-36 at 25, lines 16-17.